

(21)

Office - Supreme Court, U. S.

FILED

APR 27 1945

CHARLES ELMORE OROPLEY  
CLERK

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1944.

No. **1210**

MINOLA TAMESA,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Tenth Circuit  
and Brief in Support Thereof.

A. L. WIRIN,

J. B. TIETZ,

257 South Spring Street, Los Angeles 12.

*Counsel for Petitioner.*



## SUBJECT INDEX.

### PAGE

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.....	1
---	---

### A.

Summary statement of the matter involved.....	1
1. Opinions of the courts below.....	4
2. Jurisdiction .....	5
3. Questions presented .....	6

### B.

Reasons relied on for allowance of the writ.....	6
Brief in support of petition for writ of certiorari.....	13
Preliminary statement .....	13
Specifications of errors.....	13
Argument .....	14

### I.

The Selective Service agencies had no jurisdiction to make a valid order against the petitioner to submit to a physi- cal examination, as preliminary to induction into the armed forces of the United States.....	14
---	----

### II.

The District Court was not foreclosed from determining whether the petitioner was subject to the jurisdiction of the Selective Service system agencies by <i>Falbo v. United</i> <i>States</i> .....	18
Conclusion .....	19

## TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Billings v. Truesdell, 321 U. S. 542.....	10
Endo, Ex parte, 323 U. S. ...., decided Dec. 18, 1944.....	4
Falbo v. United States, 320 U. S. 549.....	4, 6, 8, 9, 10, 13, 18
Hirabayashi v. United States, 320 U. S. 81.....	4, 10
Korematsu v. United States, 323 U. S. ...., decided Dec. 18, 1944 .....	3, 11
Monongahela Bridge Co. v. United States, 216 U. S. 177.....	18
Union Bridge Co. v. United States, 204 U. S. 364.....	18
United States v. Fujii, 55 Fed. Supp. 928.....	4, 5, 7
United States v. Kuwabara, 56 Fed. Supp. 716.....	8, 15, 16

### MISCELLANEOUS.

Presiden. James Madison's letter to Minister to England, James Monroe (1804), Amer. State Papers, For. Rel. III, 81, 87....	17
Secretary of State Fish's letter to Minister of Central America (No. 98, July 28, 1874), MS. Inst. Costa Rica, XVII, 191.....	17
Secretary of State Seward's letter to Governor Morton of In- diana (Sept. 5, 1862), 58 MS. Dom. Let. 169.....	17

### STATUTES.

Judicial Code, Sec. 240a.....	5
Selective Service and Training Act, Sec. 11 (50 U. S. C., Sec. 311) .....	1
Selective Training and Service Act of 1940.....	15
United States Code, Title 50, Sec. 301.....	15
United States Code, Title 28, Sec. 347a.....	5

### TEXTBOOKS.

10 George Washington Law Review (May, 1942), p. 845.....	17
--	----

IN THE  
Supreme Court of the United States

---

OCTOBER TERM, 1944.

No.....

---

MINOLA TAMESA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE TENTH CIRCUIT.

---

*To the Supreme Court of the United States:*

The petitioner, Minola Tamesa, respectfully alleges:

A.

**Summary Statement of the Matter Involved.**

The petitioner, an American citizen of Japanese ancestry, ordered to report for a physical examination by his local draft board, refused and failed to do so [R. 29], as did some sixty-two other Japanese American residents at the Heart Mountain Relocation Center, a place for the detention of persons of Japanese descent.

Indicted for violating the Selective Service and Training Act, Section 11 (Title 50, United States Code, Section

311), he was tried before the United States District Court for the District of Wyoming (without a jury), found guilty, and given a sentence of three years [R. 20].

On appeal to the Tenth Circuit Court of Appeals, the judgment was affirmed, as it was in sixty-two other companion cases.<sup>1</sup>

Of admitted loyalty to the United States, the petitioner refused to obey the draft board order for the reason, as he stated, that his constitutional rights had been taken from him by his enforced evacuation from his home in California by military order, and by his enforced detention thereafter at the Heart Mountain Relocation Center; that he did not know whether or not he was a citizen of the United States; and he desired to have his rights as a citizen clarified [R. 29].

At the time he was interviewed by an F. B. I. agent he did not express a desire for the United States to lose the war and for Japan to win the war; but he stated in substance during such interview that as long as he was behind barbed wire and in what he terms "a concentration camp," he felt he had nothing to fight for [R. 35].

After having had a classification of 4C—"alien enemy" [R. 28]—he was reclassified 1A—*i. e.*, available for induction into the armed forces. Upon receipt of his 1A classification from his draft board the petitioner wrote:

"Dear Sir: I have received from your Board a reclassification to 1-A. Would you please tell me why? I am wondering if the army had not given instructions to fill out Japanese American Citizen questionnaire form 304-A, kindly advise. This class-

---

<sup>1</sup>By stipulation, the decision of the Circuit Court of Appeals in the *Fujii* case was to apply to the petitioner. [R. 1, 2, 59.]

ification as I understand it, designates the duty of a citizen to join the armed forces of his country. This is as it should be, were it not for the fact that we are receiving these reclassifications in concentration camps,<sup>2</sup> where we have been held for the past two years. All that has passed with our enforced evacuation is regarded in the words of Attorney General Biddle and Judge Denham as a mistake. Yet there has been no congressional move toward restoration of fully civil rights, the toning down of prosecution, or compensation for damages suffered thru forced evacuation. In fact there have been movements backed by certain congressmen, and others in positions of responsibility to deport all persons of Japanese ancestry. All these acts without due process of law and against the Articles of the Constitution and the Bill of Rights. It seems that we are citizens with civil rights suspended.

I believe that loyalty is like a covenant between a citizen and his country. A man should fight for his country. On the other hand he should feel that his cause is just, that he is accorded the full privileges of a citizen of a democratic nation, as clearly defined under the Constitution and Bill of Rights otherwise he will be fighting without aim in view.

There have been legal proceedings begun to obtain from the attorney general of the United States, and

---

<sup>2</sup>This Court protested the use of the phrase "concentration camp" in *Korematsu v. United States*, 323 U. S.—decided Dec. 18, 1944; hence we shall hereafter use its technical, rather than realistic, designation.

the Department of Interior, a clarification of the present and future status of persons of Japanese ancestry. Therefore, until such a time as a clear and just decision is forthcoming, I wish to ask for deferment from joining the armed forces." [R. 44, 45.]

Both the District Court [R. 19] and the Circuit below [R. 58], deemed themselves foreclosed from considering the merits of the petitioner's claim, by the decision of this Court in *Falbo v. United States*, 320 U. S. 549.

The District Court, rendering its judgment prior to *Ex parte Endo*, 323 U. S. ....., decided December 18, 1944, used *Hirabayashi v. United States*, 320 U. S. 81, as authority for its conclusion that the petitioner's detention at the Relocation Center was legal; the Circuit Court, having the benefit of this Court's ruling in the *Endo* case, construed it as requiring the petitioner to resort to habeas corpus as the exclusive method of securing judicial review of the legality of his detention.

#### 1. OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals below, in the companion case of *Fujii v. United States*, is as yet unreported. It is reprinted in the Record at page 57.

The opinion of the United States District Court below is reported in the companion case, *United States v. Fujii*, at 55 Fed. Supp. 928, and appears in the Record, page 12.



## 2. JURISDICTION.

Jurisdiction of this Court is invoked under Judicial Code, Section 240a; 28 U. S. Code, Section 347a.

The judgment of the Circuit Court of Appeals below was entered in the instant case on March 27, 1944 [R. 59, 60].

Hence the petition for certiorari herein is timely.<sup>3</sup>

---

<sup>3</sup>By stipulation [R. 1] accepted by the Circuit Court below [R. 2] the judgment in the case of the petitioner and sixty-one appellants, other than in the case of appellant Fujii, was not to be entered until the judgment in the *Fujii* case became final [R. 1]; see also [R. 60].

Thus the stipulation recited:

"That when judgment is entered in the case of Shigeru Fujii, alias Shiga Fujii, alias *Shige Fujii v. United States of America* and said judgment becomes final that the same judgment shall then be entered in the sixty-two (62) other cases above numbered." [R. 1, 2.] (Italics ours.)

The decision of the Circuit Court in the *Fujii* case was made on March 12 and judgment entered on that date [R. 60], but judgment on March 12 was entered *only* in the *Fujii* case; in the remaining cases, including that of the petitioner, judgment was *not* entered until March 27, after the time for the filing of a petition for rehearing in the *Fujii* case had passed. [R. 60.] The Circuit Court apparently construed the phrase "final judgment" in the stipulation, as meaning that the judgment should not be entered in the remaining cases until the time for filing a petition for rehearing with that Court had elapsed [R. 61]; for it recited, on March 27, in ordering the entry of judgment on March 27 in the case of the petitioner, in a document entitled "Judgment": "It is now here ordered and adjudged by this court that the judgment and sentence of the said District Court in each of the above-entitled causes be and the same is hereby affirmed." [R. 60]; and it ordered the issuance of the mandate in the petitioner's case on March 27. [R. 60.]

The Rules of Practice and Procedure In Criminal Cases (Rule XI), fixes a thirty-day period for the filing of a petition for a writ of certiorari with this Court, at 30 days after the entry of judgment.

No judgment was entered against the petitioner in the Circuit Court below, until March 27, 1945. [R. 59, 60.]

### 3. QUESTIONS PRESENTED.

(1) Do the Selective Service Agencies, under the Selective Training and Service Act, have jurisdiction to order an American of Japanese descent, forcibly detained at a Relocation Center, to submit to a physical examination leading to induction into the armed forces of the United States?

(2) Were the Courts below foreclosed from determining the above question, in the instant case, by the *Falbo* decision of this Court?<sup>4</sup>

#### B.

#### Reasons Relied on for Allowance of the Writ.

1. Whether or not an American citizen, who has been forcibly detained in a Relocation Center and thus deprived of an essential right ordinarily attending American citizenship, is nonetheless subject to the obligation of serving in our armed forces, constitutes a novel and important federal question, never heretofore considered by this Court, which should be adjudicated by this Court, not for the benefit of the petitioner alone, but in the interest of all persons of Japanese descent who are subject to the draft, as well as for all persons of any descent.

2. There is a critical conflict, in two respects, in the reported decisions, which calls for solution by this Court:

(1) Whether a person detained in a Relocation Center is subject to induction, or to submit to physical examination leading to induction.

---

<sup>4</sup>*Falbo v. United States*, 320 U. S. 549.

Thus, the opinion of United States District Judge Louis Goodman, of the Northern District of California, 56 Fed. Supp. 716, seems to be in conflict with the decision of the Circuit Court below in the instant and companion case, *Fujii v. United States* [R. 57]. Judge Goodman took the view that persons of Japanese descent involuntarily detained at the Tule Lake Relocation Center were *not* subject to induction or physical examination. Accordingly, he granted a motion to quash the indictment on that ground. From his ruling the government has not appealed. Hence it remains a final judgment.

Because no appeal was taken, the decision of Judge Goodman has been interpreted by hundreds of persons of Japanese descent in the various Relocation Centers in the United States as impliedly accepted by the Department of Justice, and hence a correct legal statement of the lack of jurisdiction of the Selective Service agencies over Japanese forcibly detained at Relocation Centers. Thus, unappealed, the ruling of the District Court for the Northern District of California has as great weight, so far as the general public at least, is concerned, as an opinion of a Circuit Court of Appeals.

Moreover, Judge Goodman's unappealed decision resulted in a cessation of criminal prosecutions for violations of the Selective Service and Training Act, of persons resided at the Tule Lake Relocation Center. At the same time, persons of Japanese descent resided in other Relocation Centers, including those at Heart Mountain, have been prosecuted for such violations. This difference in treatment of persons of Japanese descent has led many Japanese Americans throughout the Relocation Centers, other than those at Tule Lake, to the belief that the Selective Service and Training Act is being enforced by the

government in an unevenhanded manner, determined solely by the *place* of detention—a criterion having no basis in law or in fair dealing. And it is a fact, of common knowledge and of which this Court may take judicial notice, that when Tule Lake became filled to capacity, Japanese located in other Relocation Centers were detained at such other Centers, on the same terms as those detained at Tule Lake, the removal to Tule Lake or the remaining at such other Relocation Centers, being therefore conditioned solely upon the availability of accommodations at Tule Lake.

Certainly the accident of the situs of enforced residence cannot be permitted by this Court to afford a lawful basis for such discriminatory treatment of our citizens of the Japanese race.

The second conflict, between the decision of the Circuit Court below and the unappealed ruling of the District Court for the Northern District of California, is over

(2) The meaning and import of *Falbo v. United States*.

Thus, in *United States v. Kuwabara*, the District Court did not deem itself enjoined by the *Falbo* case from determining the issue on the merits, namely, whether the Tule Lake Japanese residents were subject to the orders of their local draft board, 56 Fed. Supp. 716, 718. But the Circuit Court in the instant cases deemed itself foreclosed from so ruling by the decision of this Court in *Falbo v. United States* [R. 57, 58]. Here again, this conflict should be resolved by this Court.

(3) The Courts below have not given a proper effect to an applicable decision of this Court, namely, *Falbo v. United States, supra*; and have, in effect, decided an important federal question in conflict with the true import of a decision of this Court, namely, the *Falbo* decision.

*Falbo v. United States* did not foreclose a decision by the Courts below on the merits.

The *Falbo* case does not concern itself, as does the instant case, with the *jurisdiction* of the Selective Service agencies to make the order challenged. The *Falbo* case decided only that once the Selective Service authorities have jurisdiction, the courts will not review the *correctness* of a classification, upon a criminal prosecution for a violation of a local draft board order. Thus this Court was careful to narrow its decision by stating:

"The narrow question therefore presented by this case is whether Congress has authorized judicial review of the *propriety of a board's classification* in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." (Italics ours.) (At p. 54.)

The history of this rule, first announced in the *Falbo* case, is significant, and leads to the conclusion that the narrow decision in it was not meant by this Court to be broadened to sweep in other and different factual and legal situations. For as Justice Murphy pointed out in his dissenting opinion, the *Falbo* case was a departure from the rule theretofore in effect so far as the availability of

judicial review of acts of administrative agencies was concerned. Here is what Justice Murphy said:

"It is significant that in analogous situations in the past, although without passing upon the precise issue, we have supplied such a necessary review in criminal proceedings. Cf. *Union Bridge Co. v. United States*, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; McAllister, 'Statutory Roads to Review of Federal Administrative Orders,' 28 California L. Rev. 129, 165, 166. See also *Fire Department v. Gilmour*, 149 N. Y. 453, 44 N. E. 177; *People v. McCoy*, 125 Ill. 289, 17 N. E. 786." (At p. 559.)

Moreover, this Court in *Hirabayashi v. United States*, 320 U. S. 81, apparently refused to apply the *Falbo* rule in that case, although Justice Douglas (who wrote the *Falbo* decision) urged it upon this Court. Justice Douglas was alone in his views, 320 U. S., at page 108.

It is to be noted, moreover, that even Justice Douglas acknowledged the narrow scope of the *Falbo* decision, and the danger of extending its apparent rationale to different situations by cautioning in *Billings v. Truesdell*, 321 U. S. 542, 558, that the courts should be careful not to make of the *Falbo* case a "trap" (at p. 558). Finally, it would seem, that this Court intends to continue to limit the rule in the *Falbo* case to situations where, jurisdiction of an executive agency being conceded or appearing, the agency takes arbitrary actions, as distinguished from action beyond its jurisdiction. For in *Korematsu v. United States*,

*supra*, this Court passed upon the merits of a claim that the military authorities had abridged constitutional right, *in a defense to a criminal prosecution*, for violation of a military order, involving Americans of Japanese descent.

Wherefore, your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit; and that thereupon the judgment of said Circuit Court of Appeals affirming the judgment of the District Court below be set aside.

MINOLA TAMESA,

*Petitioner.*

A. L. WIRIN,

J. B. TIETZ,

*Counsel for Petitioner.*